United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1009

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

EDWARD V. MASE,
Appellant

On Appeal From The United States District Court For The District of Connecticut, Honorable Jon O. Newman, District Judge

REPLY BRIEF OF APPELLANT EDWARD V. MASE

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The Nature of the Proceeding

From the outset of this case to the filing of its brief here, the Government has refused to apply a keen analysis to the facts and law. Instead, it has pursued a broad brush approach that obfuscates the issues involved. Defendant Mase files this reply brief in an attempt to clarify what the Government's brief has confused.

I. AS TO THE ESSENTIAL ELEMENTS OF THE OFFENSE.

In pursuing its broad brush approach, the Government has ignored the cardinal principle of our criminal law that a conviction cannot stand unless every element of the offense

has been adequately (1) alleged in the pleadings, (2) established by the evidence, and (3) charged to the jury. The key element on this appeal is an "extension of credit" as defined in 18 U.S.C. §891(1). From the beginning, the Government has resisted all efforts to measure the evidence against the specific statutory definition and has equated, without analysis, a gambling debt with an extension of credit. Even here it argues:

> "The loss of a gambling wager to a bookmaker, whereby the bettor owes to the bookmaker the amount of money wagered, is an extension of credit within the meaning of Section 4." (Gov. Br. 17).[1]

Underlying this approach may be another attempt by the Strike Force to convert the state crime of threatening, §53a-62 (Conn. Gen. Stat., 1958 rev., as amended), into a federal offense even though proof of the federal nexus--here the extension of credit--is missing. See, United States v. Tavoularis, 515 F.2d 1070, 1077-78 (2d Cir. 1975).

Turning to the three-pronged analysis set forth above, defendant makes no claim that the indictment and bill of particulars are insufficient, as a matter of pleading, to define an offense. Defendant does contend that the proof elicited and the jury instructions were deficient in light of the nature of the offense as defined both in those pleadings and in the

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1. References to the Government's Brief are designated "(Gov. Br.)," references to defendant's main brief are designated "(Def. Br.)," references to the numbered pages of the Appendix are designated "(A)," and references to the trial transcript are designated "(Tr.)."

controlling statute, and that the deficiency calls for a reversal of the District Court's judgment.

A. As To The Sufficiency Of The Proof.

The proof necessary to sustain a conviction is defined both by Congress' description of the crime and by the Government's allegations of how the crime was committed. Under the statutory definition pertinent here, an extension of credit can be established only if there is proof of (1) a loan or (2) an agreement to defer payment. 18 U.S.C. §891(1). And in alleging how defendant committed the offense charged in count two,[2] the Government specified, in the bill of particulars:

> "Edward Papagoda extended credit to Paul Dwyer with respect to the 1972 Papagoda-Dwyer account of $985.00. Edward Gianotti extended credit between June 4-6, 1976 to Dwyer with respect to the Gianotti-Dwyer account of $4,000.00." (A 25).

It is fundamental, of course, that the bill of particulars defines the charge, and that the Government's proof is "strictly limited" to the particulars which it has specified. United States v. Haskins, 345 F.2d 111, 114 (6th Cir. 1965); United States v. Murray, 297 F.2d 812, 819 (2d Cir.), cert. denied, 369 U.S. 828 (1962).

In response to defendant's challenge of the sufficiency of the proof as to both the Papagoda and the Gianotti extensions

2. Count two was the only charge on which the jury returned a guilty verdict.

of credit (Def. Br. 28-31), the Government does not even claim there was sufficient evidence to establish the alleged Papagoda extension of credit. Instead--perhaps wisely, since there was such a total failure of proof as to the existence of the Papagoda gambling debt--it focuses solely on the Gianotti debt (Gov. Br. 17-18).

The Government first misdescribes defendant's position when it argues: "Mase claims that such a transaction wherein no money was actually loaned to the victim is not an extension of credit within Section 891(1)" (Gov. Br. 17). This is only half of defendant's argument. Defendant maintains not only that the June 4-6, 1976 wager transaction between Dwyer and Gianotti does not constitute a loan, but also that at that time--which is controlling by virtue of the bill of particulars--there was not a scintilla of evidence that there was an "agreement, tacit or express, whereby repayment ... may or will be deferred." Since there was no evidence of a loan or of an agreement to defer payment, it follows that there was no evidence of an extension of credit. Only the Government's effort to ignore close scrutiny of the evidence and the specific charge can lead to a different result.

Rather than coming to grips with the real issue, the Government attempts ridicule by setting forth supposed language of an "express" agreement to defer payment and then relies on a conversation of the "following week" (Gov. Br. 18). A

twofold response is appropriate. First, defendant makes no claim that the agreement to defer must be an express agreement. Under the statute, it clearly can be a tacit agreement, but nevertheless there must be an agreement. There simply was no evidence that, on June 6th when the sporting event took place, Gianotti had tacitly agreed with Dwyer that Dwyer should pay him at some later date. Certainly Dwyer, a paid Government informant, was adept at eliciting evidence favorable to the Government (A 54-62; Def. Br. 36-37 & n. 36); indeed, for a person supposedly in fear for his life, he was remarkably adroit at devising ruses on the spur of the moment (Tr. 224-225). Surely if there had been any understanding between Dwyer and Gianotti that Dwyer could defer payment for some time after the sporting event upon which the losing bet was placed[3],

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3. The Government's comparison to betting at a racetrack (Gov. Br. 18 n. 23) is inapposite. It is no doubt true in the racetrack situation that there is no extension of credit from the track to the bettor because the bettor puts down cash when he makes his bet. That does not mean, however, that a bettor who calls his bet in to a bookie is indebted before the occurrence of the event wagered on, or that there is an agreement to defer payment if the bet turns out to be on a losing team. The debt is created not by the placing of the wager, but by the occurrence of the event. And in the absence of evidence to the contrary there is no reason not to conclude that losses to a bookie, like winnings from a racetrack, are deemed payable "immediately upon demand" (Gov. Br. 18 n. 23).

Dwyer could and would have been asked about it at the trial.[4]

Second, the conversation of the following week upon which the Government so heavily relies (Gov. Br. 18) can in no way establish an extension of credit during June 4-6, 1976, and that is what the Government must prove under its allegation. If the agreement to defer payment was not entered into by June 6th there was no extension of credit, as alleged in the indictment and bill of particulars. What happened the following week may or may not have constituted an extension of credit. It certainly did not establish what the Government had alleged in this case, however.

Skimming over the precise allegation made in the indictment and the bill of particulars and the evidence produced in this case, the Government relies on United States v. Briola, 465 F.2d 1018, 1021 (10 Cir. 1972), to revert to its assertion

4. As the Government's statement of facts described (Gov. Br. 6), defendant's arrest in this case occurred somewhat prematurely, when he unexpectedly opened a door in Dwyer's house and discovered Agent Slifka. It may well be that the Government's intentions were to "string along" defendant and induce him to make the kind of extortionate loan described in the Dwyer-Gianotti telephone conversation (A 54-62). Had that happened, the Government's task in satisfying its burden of proof would have been greatly simplified. By opening the door on Slifka and thwarting this plan, it may well be that defendant unwittingly engineered his own arrest before the Government could induce him into committing the crime for which it hoped to prosecute him. Rather than turning the matter "over to state authorities for prosecution in a more appropriate forum," United States v. Tavoularis, supra, 515 F.2d at 1077, the Government proceeded against defendant despite the nonexistence of an essential element of the federal offense.

that gambling debts "are extensions of credit" (Gov. Br. 18). To be sure, extensions of credit may involve gambling debts, but absent a loan or an agreement to defer payment a gambling debt per se does not constitute an extension of credit. In Briola, the evidence showed an express agreement to defer the payment of the gambling debt: "Arrangements were made for payment of the money the next day." 465 F.2d at 1021.

The Government, as noted, equates any gambling debt of the type here involved with an extension of credit. But if this were so, Congress would have said so instead of specifically stating that the extension of credit is an "agreement ... whereby the repayment or satisfaction of any debt ... may or will be deferred." §891(1). If the gambling debt were an extension of credit there would be no need to say anything about deferred payment.[5]

B. As To The Charge.

The Government's total misapprehension about the nature of the extension of credit infected that court's charge in this case. After refusing to charge the jury that there was

5. Perhaps the Government arrives at its position by a factual misapprehension. It states "By June 4, 1976 Gianotti was ahead, but had not been paid." (Gov. Br. 3). This is not so, for Dwyer was ahead, according to Dwyer's testimony (A160-164). If Gianotti were ahead, as the Government claims and as is not the fact (A160-164), it might be argued he tacitly agreed to defer repayment of the $1,600 by taking Dwyer's additional bet on June 4, 1976.

no evidence of a loan and refusing to define or relate the proof to the agreement to defer payment aspect of an extension of credit as defendant requested (A 136-138)[6], the court in its main charge accepted the Government's invitation to hold that a gambling debt was equal to an extension of credit:

> "If you find that Dwyer bet with Gianotti and that Dwyer lost his bets and that as a result of that betting Dwyer owed Gianotti a sum of money, then you would be entitled to conclude that an extension of credit, within the meaning of the statute, was created." (A 189).

After defendant's exception was noted, the court corrected the charge somewhat to read:

> "...[I]n connection with that phrase, extension of credit, I explained, I read you the statutory definition, and I think I explained to you that there are two ways that a transaction can be an extension of credit; either a loan or, without reading all of the statute, an agreement to defer repayment of a debt, and I told you if you find that Mr. Dwyer incurred wagering losses, let's say, to Mr. Gianotti, as an example, you'd be entitled to find that either a loan or an agreement to defer repayment of a debt, that is, an extension of credit, by one of those two terms, arose within the meaning of the statute.
>
> "Whether you conclude that is up to you. The statutory definition provides those two ways for an extension of credit to arise, either by a loan or by an agreement to defer repayment of a debt and the factual issue is for you, whether or not, based on the facts as you find them to be, either

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6. Defendant also requested a charge to the effect that the extension of credit was the federal nexus distinguishing the offense here charged from state law crimes (A 132-133). Had this instruction been given, the need for making a finding that there was an extension of credit would have been highlighted.

of those statutory definitions of an extension of credit was existing at the time that extortionate means were used to attempt to collect such extensions of credit." (A 206).

This supplemental charge was objected to as to the extension of credit point (A 207) but the court made no further correction. Even as corrected, the charge was prejudicially erroneous in two respects. First, it allowed the jury to receive the case on the theory that a loan can constitute an extension of credit even though there was no evidence of a loan; second, it was erroneous to refuse to give defendant's requested charge defining the essential element of an agreement to defer payment which had been requested as follows:

> "The law involved also states that an extension of credit is an agreement whereby the repayment or satisfaction of any debt or claim may be or will be deferred.
>
> "18 U.S.C. §891(1)
>
> "Mr. Dwyer testified about placing bets on baseball games; the bets on these games are the basis for the Government's allegation that Mr. Dwyer owed Mr. Gianotti the approximate amount of $4,000.00 on June 4-6, 1976. Obviously there was no debt or claim due to Mr. Gianotti until after the baseball games were played. Mr. Dwyer has testified that, just prior to the baseball games of June 4-6, he wagered on other baseball games with Mr. Gianotti and won. Mr. Dwyer further said that when Mr. Gianotti did not give him his winnings he--Mr. Dwyer--placed the bets of June 4-6 with Mr. Gianotti and lost. On the following Monday, June 7, 1976, according to Mr. Dwyer, Mr. Gianotti called Mr. Dwyer but never discussed a dollar amount due. He, Mr. Gianotti, wanted to go over the tab and get the proper amount due. Mr. Dwyer

added that Mr. Mase made the first contact on the following Monday, June 14, 1976. Before you can find there was an extension of credit you must find beyond a reasonable doubt that Mr. Gianotti and Mr. Dwyer agreed after the June 4-6 betting that payment of the bets which Mr. Dwyer lost could be delayed or deferred by Mr. Dwyer. If you find that the Government has not proven beyond a reasonable doubt that Mr. Gianotti and Mr. Dwyer both agreed that payment by Mr. Dwyer for lost bets on the baseball games could be deferred, you must acquit Mr. Mase. If you find that the Government has not proven one way or another what the agreement between Mr. Gianotti and Mr. Dwyer was, you must acquit Mr. Mase because the Government has the burden of proof on this issue and all other issues. I instruct you in this regard that simply because Mr. Dwyer didn't pay the bets when due does not constitute proof beyond a reasonable doubt that there was an agreement between Mr. Gianotti and Mr. Dwyer that Mr. Dwyer could defer payment of the lost bets. If Mr. Dwyer on his own simply did not pay the bets to Mr. Gianotti, but his non-payment was not with the agreement of Mr. Gianotti, you must acquit." (A 136-137).

Certainly, it is error not to charge on an essential element. United States v. Singleton, 532 F.2d 199, 204-07 (2d Cir. 1976) (charge that removed an essential element of the offense from the jury's consideration was reversible error, notwithstanding lack of objection). In this case, as the evidence developed, the essential element in issue was what, if anything, constituted an agreement to defer payment. In Kibbe v. Henderson, 534 F.2d 493 (2d Cir.), cert. granted, ____U.S. ____, 45 U.S.L.W. 3249 (Oct. 4, 1976), this Court held that a state prisoner's petition for a writ of habeas corpus should have been granted because the failure of the state court trial judge to instruct adequately

on a disputed element of the offense--causation--amounted to a denial of due process. In Kibbe, there was no specific request to charge and no exception to the court's failure to charge on causation. Here, on the other hand, the situation is even more aggravated than it was in Kibbe. The issue of whether there was an extension of credit involved the application of complex statutory terms, rather than the more familiar notion of causation; moreover, there was a proper request to charge and an objection to the court's failure to charge as requested. Under these circumstances, it is clear that the District Court's charge was erroneous.

It is also clear that the error in the charge cannot be deemed harmless. In final argument, defendant urged the jury to dissect the statute carefully in order to be sure that an extension of credit existed (Tr. 443-458). The Government, on the other hand, once again employing the broad brush approach, made no effort to claim that it had proven an agreement to defer payment; it simply relied on the position that a gambling debt per se sufficed (Tr. 441). The jury deliberated for almost four hours; even then, it was unable to reach a verdict on count one. With a proper instruction, the result on count two may well have been different.

II. AS TO PRETRIAL PUBLICITY, DOUBLE JEOPARDY, AND THE HARTFORD JURY

A. The Government Can Neither Disclaim Responsibility For The Publicity Nor Ignore Its Prejudicial Nature

The Government oversimplifies the record when it claims that "[t]here was no improper pretrial publicity generated by the Government ..." (Gov. Br. 10). To say that the discussion of a case pending before the grand jury was not improper is to ignore this Court's admonition in Bando v. United States, 244 F.2d 833, 837-38 (2d Cir.), cert. denied, 355 U.S. 844 (1957), that law enforcement authorities are to avoid public comment on persons about to be indicted. It is also to ignore the many questions left unanswered by the reporter Houlding (Def. Br.12-13), as well as the published report that federal investigative sources had labeled defendant as a member of the New Haven-Bridgeport area syndicate, holding a position subordinate to "reputed organized crime boss" Charles DeMartin (A 40). It is true that, in addition to his unnamed federal sources, Houlding had referred to his newspaper's morgue for background information on defendant (A 78-79). However, he expressly stated that the morgue was not his only source:

> "Q. And is it your testimony that the reference I just read to you about him being--organized crime came from your old morgue?
>
> "A. Some of the information ..."(A 79).

Houlding refused to say whether other information referring

to defendant as an "organized crime figure" came from Government officials (A 80-81), and Judge Newman declined to compel him to do so (A 114). In the face of this record, the Government can hardly disclaim responsibility for the publicity.

The Government further ignores the record in its treatment of the exposure of the first jury to publicity, for it limits its consideration to the three jurors who had read of Gianotti's change of plea (Gov. Br. 12-13). But the record is indisputable that one of those three jurors not only thought that it was defendant who had changed his plea, but also read that defendant "was a member of organized crime" (A 126). Moreover, two other jurors, not even mentioned by the Government, had read that defendant was a member of "organized crime" or a "syndicate" (A 121, 124)[7]. To suggest, in the face of this record, that there was no "substantial and incurable prejudice" (Gov. Br. 12), and that the jurors' "ability to continue to serve impartially" should have been explored (Gov. Br. 13) is to fantasize. Jurors' declarations of impartiality at this point would have been as deserving of credence as those rejected by the Supreme Court in Irvin v. Dowd, 366 U.S. 717, 727-728 (1961)[8].

7. The fact that Judge Newman closed his eyes to the "organized crime" references (A130) does not mean that this Court must be similarly blinded.

8. Accord, United States v. Coast of Maine Lobster Co., 538 F.2d 899, 901 (1st Cir. 1976); United States v. Concepcion Cueto, 515 F.2d 160, 164 (1st Cir. 1975); Silverthorne v. United States, 400 F.2d 627, 638 (9th Cir. 1968); United States ex rel. Bloeth v. Denno, 313 F.2d 364, 373 (2d Cir.) (en banc), cert. denied, 372 U.S. 978 (1968); Delaney v. United States, 199 F.2d 107,112-13 (1st Cir.1952).

The Government's reliance on United States v. D'Andrea, 495 F.2d 1170 (3d Cir.1974) (per curiam)for the proposition that the material was not prejudicial is misplaced. There, at the end of a thirty-five day trial, two jurors were exposed to publicity describing defendant's indictment on an unrelated offense and linking defendant to the "underworld". Recognizing that these statements "did have prejudicial potential," id. at 1172, the Third Circuit nonetheless held that a mistrial was not required because the material was not directly incriminating, because the jury had already heard evidence regarding the facts underlying the indictment, and because the jurors' exposure came after they had heard all the evidence, including extensive testimony by defendant. Here, on the other hand, the knowledge of Gianotti's change of plea--and the mistaken impression that defendant himself changed his plea[9]--were directly incriminating, the jury would not have been entitled to hear evidence of the change of plea and of defendant's alleged "organized crime" ties, and the exposure came before any evidence was heard, so as to color the jury's view of the entire case. The conclusion that the prejudice here was actual, substantial and incurable cannot be avoided.

9. In D'Andrea, the Third Circuit distinguished its prior decision in United States ex rel Doggett v. Yeager, 472 F.2d 229 (3d Cir. 1973), where the jury had been exposed to an article describing the defendant's withdrawal of an earlier plea of guilty to the very crime being tried.

B. The Government Does Not Come To Grips With Defendant's Double Jeopardy Claim

The Government only obliquely refers to defendant's double jeopardy claim, characterizing his position as being that the only proper remedy was dismissal once the publicity occurred (Gov. Br. 12). This characterization unfairly limits defendant's position. What defendant in fact claimed before the District Court was that, once the jurors testified as to their exposure to publicity, trial before that jury could not continue, and retrial before a second jury was precluded by the double jeopardy clause. Alternatively, if that position was rejected, defendant sought retrial in New Haven after a continuance or, failing that, an immediate retrial in New Haven with a searching voir dire.[10] Before this Court, defendant again asserts his double jeopardy claim, and, if that

10. The Government's suggestion that Judge Newman "pressed the defendant, with little avail, to state what remedy he sought from jury contamination short of outright dismissal" (Gov. Br. 12 n. 15) is simply untrue. Defendant clearly set forth the relief he sought:

> "THE COURT: In any event, what you want following a mistrial is a continuance then; is that correct?
>
> "MR. ZELDES: Yes, your Honor, a reasonable amount of time to diffuse what I feel is the prejudicial publicity, and if that's not granted, your Honor wants to impanel a new jury tomorrow with proper voir dire, that would be my next alternative down the line.
>
> "I am trying to give you the priorities of my request. Essentially, they are: straight dismissal of the indictment; mistrial based on the fault of the government; mistrial with the continuance; mistrial with further impaneling of the jury, with your Honor or defense counsel asking for a detailed -- getting a detailed voir dire examination." (Transcript of October 5, 1976, p. 134).

position is rejected, argues further that the retrial before a jury from the Hartford Division was improper.

Since the filing of defendant's main brief, this Court decided United States v. Grasso, ____F.2d ____, slip op. 2247 (2d Cir. March 9, 1977), setting forth the same double jeopardy guidelines as urged by defendant:

> "If no alternatives can be found, a mistrial may be declared, and a retrial cannot be attacked on double jeopardy grounds unless wrongdoing or negligence on the part of the Government caused the mistrial." Slip op. at 2257 (emphasis added).

It is, of course, defendant's claim here that the action of the Government and the trial court caused the mistrial, thereby precluding retrial under the double jeopardy clause even though defendant was compelled to move for the mistrial after his motion to dismiss was denied.

In Grasso, this Court scrutinized the actions of the defense, the Government and the court in determining whether the claim of double jeopardy could prevail. Here, the necessity for a mistrial was not precipitated by the defendant, but did result from the actions of the Government and the trial court.

1. As to the defendant: Defendant did nothing at all to precipitate the necessity for the mistrial; to the contrary, on numerous occasions he moved that the pretrial proceedings

be closed to the press and public to avoid the further generation of publicity (Transcript of September 30, 1976, p. 1; Transcript of October 5, 1976, pp. 87, 131). None of the publicity refers to defendant as a source. And when defendant moved for a mistrial--only after his motion to dismiss was denied--he was compelled to do so due to the impossibility of salvaging an impartial jury.[11]

2. As to the Government: Prior to the return of the indictment, the New Haven Journal-Courier carried as its lead article on page one a story with the following five-column headline:

> "In Area Loanshark Case
> "INDICTMENT DUE TODAY" (A 37).

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11. Relying on Murphy v. Florida, 421 U.S. 794 (1975), the Government apparently contends that the mistrial was inappropriate because of a lack of showing of actual prejudice (Gov. Br. 12-13). While defendant contends that the jurors' testimony establishes such prejudice (see Part II.A, supra), he also argues that, because this is a federal prosecution it falls within the less stringent standards established by the Supreme Court in the exercise of its supervisory powers in Marshall v. United States, 360 U.S. 310 (1959). As one commentator has noted:

> "...[T]he Marshall and Janko [Janko v. United States, 366 U.S. 716 (1961), rev'g mem. 281 F.2d 156 (8th Cir. 1960)] decisions are of special interest because the Court there virtually treats the news stories as presumptively prejudicial notwithstanding the promises of the jurors to disregard them. Thus, the Court seems to recognize the subliminal impact on federal juries of even a single newspaper item." Manes, Irvin v. Dowd: Retreat From Reality, 22 Law in Transition 46, 58 (1962).

The reporter Houlding testified that the source of this article was the United States Attorney (A 65, 69, 75-77). Additional publicity indicates by its content the Government's role in its generation:

> "A federal grand jury is expected to return an indictment today against Edward V. Mase for alleged loan-sharking activities.... Dorsey Tuesday evening said the grand jury is expected to return an indictment today." (A 37).
>
> "A federal grand jury, which met here Tuesday to inquire into alleged organized crime activity in the New Haven area, was expected to hand up indictments today.... The sought-for arrest of Mase by federal prosecutors was, however, dismissed on 'technical grounds' according to U.S. Attorney Peter Dorsey.... Dorsey said Tuesday the case for Mase's arrest was dismissed Monday because Federal Organized Crime Strike Force Attorney Paul E. Coffey was not ready to proceed against Mase at that point, but that the dismissal has no effect on the continuing investigation of Mase's alleged role in the case." (A 38).
>
> "Reportedly, Coffey's agents have information that Mase had other 'suckers' who owed gambling debts.... Dwyer reportedly has the protection of the FBI pending his appearance as a witness against Mase and Gianotti." New Haven Journal-Courier, "Area Pair Indicted in Loanshark Case," July 15, 1976, p. 1 (Andrew L. Houlding) (contained in Volume I to the Record on Appeal).
>
> "Wednesday's two loansharking indictments in U.S. District Court here may be only the start of what federal officials say is a broad probe of racketeering in the New Haven area.... He [Mase] has been described as a significant 'organized crime' figure in this area." (A 39).
>
> "Federal investigative sources claim Mase and Gianotti hold subordinate positions to DeMartin's in the New Haven-Bridgeport area syndicate." (A 40).

> "Federal sources indicate the strike force is hoping to make further inroads into alleged organized crime activities in the greater New Haven area." New Haven Journal-Courier, "Man Denies Mase Case Involvement", September 6, 1976, p. 44 (Andrew L. Houlding) (contained in Volume I to the Record on Appeal).

In addition, despite its knowledge of defendant's concern with the impact of publicity, the Government took no precautions to minimize the generation of publicity resulting from the change of plea by Gianotti. The Government could well have suggested that the plea be taken in chambers or in Hartford, where the news coverage was not as intense.

3. As to the court: Like the Government, the court failed to take any steps to dilute the impact of Gianotti's plea change. Moreover, the court, without explanation, denied defendant's request for a closed hearing and the open hearing resulted in additional publicity about the case. "The Sixth Amendment right to a public trial is a right of the accused, and of the accused only." Geise v. United States, 265 F.2d 659, 660 (9th Cir. 1959). Even if defendant does not have an "absolute right to compel a private trial", Singer v. United States, 380 U.S. 24, 35 (1965), there was not even a stated basis for the denial here. Certainly the court's position

was not consistent with §3.1 of the American Bar Association Standards Relating to Fair Trial and Free Press (1968). [12] Had defendant's motions been granted, at least one of the jurors might not have become exposed to publicity: juror McDonald, who testified to reading that defendant had entered a guilty plea and was a member of organized crime, said that he read that article in the New Haven Register on "Friday", which would have been October 1, 1976 (A 128). That article described the September 30, 1976 hearing (A 104). Had defendant's motion to close that hearing been granted, the article might never have

12. "3.1 Pretrial hearings.

"It is recommended that the following rule be adopted in each jurisdiction by the appropriate court:

"Motion to exclude public from all or part of pretrial hearing.

"In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury."

appeared, and Mr. McDonald might have been spared his unfortunate misapprehension.

In sum, considering the totality of circumstances and measuring the actions of the defense against the actions of the Government and the trial court, retrial was precluded by the double jeopardy clause.

C. The Government Misapprehends Defendant's Claim As To The Hartford Jury

In responding to defendant's claim that the jury selection in this case was improper, the Government once again fails to read the record and to analyze the claim advanced.

With regard to the record, the Government faults defendant for not seeking a voir dire of the first jury to determine if it could have continued impartially (Gov. Br. 14). Although defendant did not pursue this exercise in futility, he did make a request that the trial be continued to some future date to allow the effects of the publicity to subside, or, if that was denied, to pick a jury the next day with a searching voir dire. Neither of those remedies would have entailed moving the trial out of New Haven. Defendant also sought to return to New Haven when the case was reached in Hartford; Judge Newman at first offered to return to New Haven, but, after defendant accepted the offer, changed his mind (A 142-144). Defendant's position, therefore, was in no way inconsistent with a trial

in New Haven.

With regard to defendant's legal claim, the fact that the Government argues in terms of "venue" and of the district court's "discretion" and "power" (Gov. Br. 13-14) indicates its total lack of comprehension of defendant's argument. Defendant expressly disclaimed any argument based on venue under the Sixth Amendment (Def. Br. 20); his argument is based not so much on the place of trial, or on the district court's discretion or power to move the trial to any particular place, as it is on the fact that, under Connecticut's Jury Selection Plan, no residents of the place of the crime were included in the Hartford array. Defendant's claim is that residents of the place of the crime are a distinctive group in the community, and that their systematic exclusion from the jury selection process deprived defendant of his right to a jury drawn from a representative cross-section of the community. Under this claim, the place of the trial and the district court's power to move the trial are only relevant insofar as the inevitable operation of the Jury Selection Plan at a particular place of trial would violate the cross-section requirement.

Because defendant's claim is based on the cross-section and not the venue requirement of the Sixth Amendment, the excerpt from Zicarelli v. Gray, 543 F.2d 466, 479 (3d Cir. 1976) (en banc) relied on by the Government (Gov. Br. 13-14) is not on point. The court was there concerned with venue, which

it considered to be such a distinct issue from the cross-section requirement that it found a lack of exhaustion of state remedies on the latter issue, but no lack of exhaustion on the former.

Finally, the Government's argument regarding proof of prejudice ignores the fact that, where the cross-section requirement is violated, no specific showing of prejudice need be made. Taylor v. Louisiana, 419 U.S. 522, 532 n. 12 (1975); Peters v. Kiff, 407 U.S. 493, 504 (1972). Nor is it necessary, where residents of the place of the crime have been systematically excluded from the array, to show demographic differences between the place of the crime and the place from which jurors are selected. People v. Jones, 9 Cal. 3d 546, 510 P.2d 705, 711 (1973).

III. AS TO MISCELLANEOUS MATTERS

A. The Preliminary Hearing.

The Government's response to defendant's claim that it was improper to abort the preliminary hearing distorts both the case law and the record. United States v. King, 482 F.2d 768 (D.C. Cir. 1973),[13] did not hold, as the Government suggests (Gov. Br. 9), that relief was required because of the prejudice resulting from continued incarceration following a defective preliminary hearing. Indeed, the court specifically noted that the return of the indictment "ma[de] conclusive the existence of probable cause to hold the accused for further prosecution." Id. at 776 (footnote omitted). The court went on to state, however, that

> "... victims of legally infirm preliminary hearings [may] avail themselves of appropriate remedial measures even after an indictment has issued." Ibid. (footnote omitted).

That is precisely what defendant is attempting to do here.

Defendant claims that an added factor requiring relief here is the Government's motivation in not going forward at the preliminary hearing. The Government states:

> "... Mase claims that the Government's decision not to proceed intentionally deprived him of

13. King was concerned with a preliminary hearing in the District of Columbia Court of General Sessions, now the Superior Court of the District of Columbia -- not a California court. 482 F.2d at 770 & n.2.

Brady material. This bold claim is frivolous." (Gov. Br. 9).

Yet, at page 7 of its brief, the Government concedes:

> "As Mase correctly surmises in his Brief, the Government did not proceed at the hearing because to do so might have disclosed the nature and extent of Dwyer's confidential cooperation in unrelated criminal investigations at a time when the government was attempting to evaluate whether further disclosure of Dwyer as a government witness was worth the potential danger to him."

To call defendant's claim "frivolous", on the one hand, and to concede it, on the other, defies logic. And to argue that the Government subsequently provided a sealed affidavit to Judge Newman detailing Dwyer's cooperation cannot explain away the fact that before the magistrate the Government created the impression that it was fearful of possible harm to Dwyer at the hands of defendant, not unnamed others on whom Dwyer had previously informed (A 14).

B. The Constitutionality of the Consumer Credit Protection Act

Again employing its broad brush approach, the Government has misconstrued the case law pertinent to defendant's attack on the constitutionality of the Consumer Credit Protection Act, 18 U.S.C. §891 et seq. United States v. Schwartz, 548 F.2d 427, 428 (2d Cir. 1977), and United States v. Sears, 544 F.2d 585, 586 (2d Cir. 1976), do not, as the Government contends (Gov. Br. 16), reject defendant's constitutional claims, since those decisions addressed only the scope of the statute, not

its validity (Def. Br. 24 n. 24). Nor is it tenable for the Government to argue that, in upholding the statute in Perez v. United States, 402 U.S. 146 (1971), the Supreme Court "did not...limit its applicability to 'loansharks'" (Gov. Br. 16), since the Court explicity stated the question before it to be whether the statute was constitutional "as construed and applied to petitioner", who was a loan shark, 402 U.S. at 146. The Court's affirmative answer to that question can in no way be conclusive of the question whether the statute, as construed and applied to a non-loansharking transaction, is valid; only recently the Supreme Court held that its own prior decision upholding a statute attacked on particular grounds was not controlling where the same statute was attacked on different grounds. Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District, ____U.S.____, 45 U.S.L.W. 3565, 3566 (February 22, 1977). Finally, the claim that defendant's definition of loansharking is too narrow (Gov. Br. 16) ignores the fact that defendant's characterization of a loan shark is merely reflective of the description utilized both by the Congress and by the Supreme Court in Perez. 402 U.S. at 149.

The Government also contends that defendant in fact engaged in loansharking activity (Gov. Br. 17), but it either ignores or confuses the record in five respects:

--First: There was no demand that Dwyer "pay $400 weekly in interest payments" (Gov. Br. 17). According to the Gianotti-Dwyer conversation (A 54-62), the refinancing alternatives available to Dwyer were (1) paying $200 a week, which would not pay down the principal, until such time as the principal could be paid off, or (2) taking a twenty per cent loan, which would be paid down at the rate of $400 per week. Neither alternative calls for the weekly payment of $400 as interest.

--Second: The Government is attempting to utilize Gianotti's statements in the conversation with Dwyer for the truth of their contents, (Gov. Br. 21) [14] rather than for the limited purpose for which they were admitted--that is, insofar as they constituted threats, which were held admissible as verbal acts (A 165-166).

--Third: The portions of the conversation relied on by the Government regarding the terms of refinancing do not constitute threats, and should have been held inadmissible (Def. Br. 35-42; Part III.C, infra).

--Fourth: Even if Gianotti's statements may be taken for the truth of their contents, there is no evidence that defendant would have set the terms of the refinancing:

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14. The Government justified this assertion on the erroneous ground that "each defendant was indicted individually in Counts Two and Three." (Gov. Br. 21). But Count Three related only to Gianotti and was not submitted to the jury. A fresh copy of the indictment containing only the conspiracy count and the substantive count against Mase was prepared for submission to the jury.

"DWYER: Who loans out this money?
"GIANOTTI: I don't know...."
(A 60).

--Fifth: Assuming that Gianotti's statements can be taken for the truth of their contents, and that they establish that defendant would have set the terms of the refinancing, the fact that defendant might have engaged in activity that might have entailed a loansharking transaction cannot serve to convert the prior gambling debt into a loansharking transaction. Surely the Government cannot claim that, if a person who is a loan shark does "X", criminal liability under §894 may be imposed upon him, whereas if a person who is not a loan shark does "X" the statute does not reach him.

In sum, by utilizing the broad brush approach, rather than analyzing the issues, the Government has filed to meet defendant's challenge to the constitutionality of the statute.

C. The Admissibility of the Dwyer-Gianotti Conversation

The Government claims that the admissibility of the Dwyer-Gianotti tape need not have been limited to verbal acts, but that the entire conversation could have been admitted for the truth of its contents (Gov. Br. 21). The authority cited by the Government, however, does not support such a claim. United States v. Borelli, 336 F.2d 376, 388-89 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965), did not involve the rule on co-conspirators' declarations; rather, the issue was whether the defendants had established the defense of withdrawal from the

conspiracy so as to be entitled to an acquittal as a matter of law. And in United States v. Agueci, 310 F.2d 817, 838-39 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963), there was affirmative evidence that the defendant Valachi had in fact continued his participation in the conspiracy after his arrest. Significantly, although both Borelli and Agueci entailed the question of post-arrest participation in the conspiracy, all of the arrests involved were unrelated to the various conspiracies in question. Here, on the other hand, defendant was arrested for the same conspiracy to which the conversation purportedly relates, and there was no evidence that, after his arrest, defendant continued to participate in the conspiracy.

The Government also claims that all of the Gianotti call was properly admitted as a verbal act (Gov. Br. 22). In so arguing, however, the Government mischaracterizes the conversation; nowhere did Gianotti say that Dwyer would be killed if he failed to renegotiate the loan. Gianotti's most serious threats entailed what would happen to Dwyer if he refinanced and then failed to make the payments. To say that these threats relating to a future extension of credit were admissible against defendant because they "did no more than carry Mase's prior threats to the next logical step" is to ignore the fact that in the indictment (A 19-20) and bill of particulars (A24-26) defendant was charged with using and conspiring to use extortionate means to collect

an extension of credit that was made between June 4 and June 6, 1976. The Government cannot claim that a threat used in the collection of a different extension of credit--indeed, an extension of credit that never took place--is admissible against defendant on the crime with which he is charged unless it is to be permitted, in effect, to amend the indictment and bill of particulars while the case is on appeal to this Court.

The Government goes on to state:

> "Finally, the jury's conviction on Count One does not create a presumption of prejudice because the Gianotti call was admitted." (Gov. Br. 22)[15]

Defendant is at a loss to understand the significance of the concept of "a presumption of prejudice". If the conversation was admitted erroneously the judgment must be reversed unless this Court considers the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). There is no need for defendant to establish a presumption of prejudice.

In any event, in this case the likelihood of prejudice is clear. Although the Government urged the jury to find that Mase and Gianotti conspired to collect the debt by the "carrot and stick" method (Gov. Br. 22), the jury's inability to reach a verdict on the conspiracy count may well indicate that it did not accept this theory; rather, the evil picture of defendant painted

15. Apparently the Government is confused as to the counts; the jury was unable to reach a verdict on count one (the conspiracy count) but convicted on count two (the substantive count).

in the Gianotti conversation may have led the jury to conclude that defendant was pressuring Gianotti as well as Dwyer. And that evil picture may well have spilled over into the jury's deliberation on the substantive count, clouding its ability to give dispassionate analysis to the complex statutory terms involved.

Conclusion

The numerous instances catalogued in this brief where the Government has misstated the law, the facts and the claims advanced by defendant are reflective of its approach to this entire case. Only by refusing to apply disciplined analysis can the Government adhere to the positions it takes. Upon careful scrutiny, those positions become untenable.

For all the reasons advanced both here and in defendant's main brief, the judgment of the District Court should be--and defendant Mase requests that it be--reversed.

Dated at Bridgeport, Connecticut, this 12 day of April, 1977.

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DOCKET NO. 77-1009

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

EDWARD V. MASE,
Appellant

CERTIFICATE OF SERVICE

I, Jacob D. Zeldes, Counsel to defendant-appellant Edward V. Mase in the above-entitled matter, hereby certify that on the 12th day of April, 1977, I served the attached Reply Brief of Appellant Edward V. Mase upon the attorney for the appellee by depositing copies in the U.S. mails, postage prepaid, addressed to him at the following address:

Paul E. Coffey, Esquire
Special Attorney
U.S. Department of Justice
450 Main Street
Hartford, Connecticut 06103

Dated at Bridgeport, Connecticut this 12th day of April, 1977.

Jacob D. Zeldes
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